

HUD's Affirmatively Furthering Fair Housing Rule: A Contribution and Challenge to Equity Planning for Mixed Income Communities

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In July 2015, the [U.S Department of Housing and Urban Development](#) (HUD) issued its final [Affirmatively Furthering Fair Housing](#) (AFFH) Rule, perhaps the most significant fair housing initiative of the Obama Administration. This rule reflects new learning and a refined approach to the core challenge of remedying ongoing housing and development barriers that perpetuate spatial disparities in opportunity, and it represents an important planning tool for creating equitable and inclusive communities. Specific components of the rule link directly to mixed-income strategies and incentivize those that are consistent with affirmatively furthering fair housing strategies and mandates. The rule can also act as a check on mixed-income strategies that are insufficiently attentive to the needs of communities of color. The rule is under threat, and it would be a major step backward for efforts to increase *economic* as well as racial integration, were it to be dismantled.

After providing a brief background on the legal basis of HUD's rule, this essay explains the framework and theory behind the rule, and how a rule aimed at overcoming racial segregation can support the creation and preservation of mixed-income communities. We lay out key details of the rule and how they connect to more equitable and inclusive planning, and highlights potential connections and tensions for mixed-income strategies within the context of the rule. We then assesses early experience with its approach, and the threat posed by HUD's current suspension of the rule. We conclude with a discussion of implications for action (or at least attention) with respect to the rule, particularly with respect to mixed-income strategies.

The Fair Housing Act as a Tool for Income Mixing that Promotes Equity and Inclusion

Background. [The Fair Housing Act](#) (FHA), enacted in 1968 in the immediate aftermath of the assassination of Dr. Martin Luther King Jr., is a robust and wide-ranging piece of civil rights legislation. As the courts have recognized, the Act is designed and has been given broad application to fully achieve “the policy of the United States to provide, within constitutional limitation, for fair housing throughout the United States.”¹ As a tool to promote income-mixing strategies that promote equity and inclusion, it has both significant power and potential, but also limitations, that come to the fore as one anticipates the potential use of the AFFH rule in this domain.

¹ Fair Housing Act of 1968, 42 U.S.C. § 3601 (1968).

In enacting the FHA, Congress recognized that simply combatting future discrimination based on race, color, and other protected bases would not be enough to overcome the history of racialized policy and practices that led to dual housing markets and what the Kerner Commission (whose report was issued less than two months before the FHA's passage) recognized as "two societies."² To achieve this goal, the FHA went beyond anti-discrimination provisions and required the federal government to take "affirmative" steps to overcome this legacy. Specifically, it imposed on the federal government an obligation "affirmatively to further fair housing" which we refer to as the AFFH mandate.³ This recognition of structural inequality and racism was visionary.

Given the FHA's starting point as a piece of civil rights legislation, it has an important history of grappling with the interplay between racial discrimination and policies or practices that differentiate based on income. This is seen, for example, in the Fair Housing Act's long-standing application to override local zoning rules that are intended or have the consequences of precluding the creation of affordable housing.⁴ Similarly, from its earliest days, the Fair Housing Act has been applied to the process and assessment of redevelopment efforts and programs seeking to create mixed-income communities, especially when the majority of tenants who may be displaced are families of color.⁵ In these and the many other situations in which the FHA has

² The Kerner Commission stated that "fundamental to the Commission's recommendations" was the need for "[f]ederal housing programs [to] be given a new thrust aimed at overcoming the prevailing patterns of racial segregation." United States Kern Commission, *Report of The National Advisory Commission on Civil Disorders* (Ann Arbor, MI: University of Michigan Libraries, 1968),

<https://babel.hathitrust.org/cgi/pt?id=mdp.39015000225410;view=1up;seq=2>.

³ The Fair Housing Act, 42 U.S.C §3608(d) states "All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes. See also Fair Housing Act, 42 U.S.C. § 3608(e) (5). Litigation has made clear that the AFFH mandate applies to all federal investments, including the Low-Income Housing Tax Credit Program. See *Re: Adoption of uniform housing affordability controls by the New Jersey Housing and Mortgage Finance Agency*, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2007).

⁴ Under the "disparate impact" theory of discrimination, the courts have long held that exclusionary zoning ordinances that lack requisite justification violate the Fair Housing Act. See, e.g., *Huntington Branch, NAACP v Town of Huntington*, 844 F.2d 926 (2nd Cir.), *aff'd per curiam*, 488 U.S. 15 (1985). The United States Supreme Court recently upheld this method of proving a Fair Housing Act violation. *Texas Dept. of Housing v. Inclusive Communities Project*, 135 U.S. 2507 (U.S. Super. Ct., 2015). See generally, Robert Schwemm, *Housing Discrimination: Law and Litigation* (New York: C. Boardman, 1990).

⁵ From its earliest days, the Fair Housing Act required assessment of racial impact in site selection and project planning in a range of subsidized housing programs, see, e.g., *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970) and *Re Adoption of 2033 LIHTC Qualified Application Plan*, 848 A.2d 1 (N.J. App. 2003). Consistently, Fair Housing Act concerns have been raised regarding mixed income development that has not been attentive to its racial implications. See, e.g., Thomas C. Kost, "Hope After HOPE VI? Reaffirming Racial Integration As A Primary Goal In Housing Policy Prescriptions," *Northwestern University Law Review* 106, no. 3 (2012): 1404, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1106&context=nulr>.

been applied, the starting point is racial impact but the significance of income disparities frequently becomes relevant.⁶

In many respects, this makes the AFFH's mandate as applied to income-mixing strategies an important and powerful but sometimes limited element in the toolkit to address constraints on equity and inclusion in housing and development policy. Given the significant interplay in the United States between race and income, the AFFH mandate has considerable relevance to when and how income-mixing strategies advance efforts to overcome our racial history and, equally importantly, when they do not. More attention is warranted to the interplay between the goals of income-mixing strategies and the AFFH mandate, and HUD's rule provides an important starting point given the strategies and approaches it prioritizes.

Of course, it must be noted that the efforts to translate the AFFH mandate into practice over the 50 years since the FHA's passage has been a halting process. The efforts to implement the AFFH provisions have met a host of political, programmatic, and other roadblocks that prevented significant advances and led to what some commentators have termed a "fundamental imbalance in [the Act's] statutory missions."^{7,8} This history informs how one should examine the AFFH rule's ambition and approach and its relationship to income-mixing strategies. This backdrop also reinforces the significance of the current fight over the rule's future.

The Rationale Behind the AFFH Rule. With the 2008 election of President Obama and his appointment of Shaun Donovan as HUD Secretary, the new Administration revisited the AFFH mandate to determine how it could be revitalized as part of the Administration's broad commitment to furthering equity.⁹ In doing so, the new Administration was influenced by the reality that the many deep challenges it faced as it took office—the record high rate of foreclosures, the Gulf Region's failed post-Katrina recovery efforts, and the specter of climate change— all had deep and widely recognized racial dimensions.

Against this backdrop, the new Secretary and his team started with several premises that shaped HUD's overall agenda and informed its approach to the AFFH mandate. First, they recognized that major challenges ranging from climate change to ongoing racial disparities along numerous measures of well-being required approaches that transcended public sector silos and would best be achieved by coordinated planning and integrated resource allocation. Applied to

⁶ The FHA centers on the consequences of policies and programs for racial or ethnic minorities, families with children, people with disabilities, and others specifically protected under the statute.

⁷ Nestor Davidson and Eduardo Penalver, "The Fair Housing Act's Original Sin: Administrative Discretion and the Persistence of Segregation" (Unpublished manuscript, 2018).

⁸ See for a general discussion: Timothy. M. Smyth, Michael Allen, and Marisa Schnaith, "The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients," *Journal of Affordable Housing and Community Development Law* 23, no. 2 (2015): 238, https://www.jstor.org/stable/24389794#metadata_info_tab_contents.

⁹ For more details on the history and context of the rule's development, see Katherine O'Regan and Ken Zimmerman, "The Potential of the Fair Housing Act's Affirmative Mandate and HUD's' AFFH Rule," *Cityscape* 21 no. 1 (2019): 89, <https://www.jstor.org/stable/pdf/26608012.pdf>.

the AFFH effort, this suggested that previous approaches—which had been driven primarily by and focused on the agency’s fair housing office—needed to be broadened, and would require the full participation and buy-in by the components of HUD responsible for community development and public and assisted housing. The goal was to ensure that HUD’s annual distribution of more than \$40 billion to state and local governments, public housing authorities, and Native American tribes were part of AFFH implementation.¹⁰

Second, HUD aspired to revisit how best to define the respective roles of the federal government and state and local actors in operationalizing the AFFH mandate. Pursuant to the FHA’s AFFH provisions, HUD had a legal obligation to affirmatively further fair housing, and the legal authority to take enforcement action when its grantees failed to do so.¹¹ But beyond that starting point, there were myriad ways of utilizing federal authority to harness state and local housing and community development capacity. Decades of poor experience with top-down, one-size-fits-all approaches to community development had inspired more locally driven and locally tailored comprehensive efforts, and state and local governments, private entities, and non-profit groups had developed new capacities as a result.¹² In the AFFH context, this meant prioritizing the federal government’s ability to set direction, articulate policy and program options, incentivize participation, and provide resources for enhancing local capacity while empowering state and local actors to take leadership in identifying best approaches tailored to local conditions.

Finally, there was a deep belief and increased appreciation of the importance and potential for robust community engagement to improve both process and outcome. While community participation had a long and mixed history in housing and civil rights practice and policymaking, HUD recognized that engagement of community groups and the broader public could make the difference between a paper exercise and meaningful action. There were clear-cut challenges to enable meaningful and effective community engagement in the AFFH context,

¹⁰ In fact, the ideal approach to the AFFH mandate would move beyond HUD programs and incorporate transportation, education, and other key elements that addressed barriers to fully equal opportunity, such as with the cross-HUD-DOT-EPA Sustainable Communities Initiative that HUD led. See “Regional Planning Grants and the SCI,” HUD Exchange, accessed May 16, 2019, <https://www.hudexchange.info/programs/sci/>.

¹¹ The importance of the AFFH legal obligation had been reinforced in 2007 when a federal court found Westchester County had violated the False Claims Act by falsely certifying its compliance with the AFFH mandate. See U.S. ex rel. Anti-Discrimination Center v. Westchester County, 668 F. Supp. 2d 548 (S.D.N.Y. 2009). In the aftermath of this decision, HUD engaged with the plaintiff fair housing group and the County and entered into a Consent Order that set forth actions to place the County in AFFH compliance. That Consent Order became hotly contested, and, following judicial findings that the County had violated the Order, led HUD to suspend distribution of HUD funds to the County.

¹² HUD’s Choice Neighborhoods and the Department of Education’s Promise Neighborhoods exemplify this newer orientation. See Raphael Bostic and Luke Tate, “Fighting Poverty and Creating Opportunity: The Choice Neighborhoods Initiative,” *PD&R Edge* (blog), accessed May 16, 2019, https://www.huduser.gov/portal/pdredge/pdr_edge_frm_asst_sec_101911.html; “Promise Neighborhoods (PN),” Office of Innovation and Improvement, United States Department of Education, accessed May 16, 2019, <https://innovation.ed.gov/what-we-do/parental-options/promise-neighborhoods-pn/>.

however. The capacity of local communities, especially low-income communities of color, to use, access, and deploy information to influence public resource allocation was highly uneven. Further, it was uncertain what data would be most useful and how it might be shared to enable community groups to participate effectively.

Each of the Administration’s three premises had particular resonance given the existing state of the AFFH process. Prior to HUD’s AFFH final rule in 2015, recipients of HUD formula grants mainly complied with their “affirmatively furthering” obligation through the Analysis of Impediments (AI) process.¹³ Jurisdictions were required to conduct an AI to fair housing in their jurisdictions and take appropriate action to address those impediments. The AI process, however, was widely recognized as highly flawed—as confirmed by a review by the Government Accounting Office (GAO), which in dry, objective terms made clear that the AI process was meaningless.¹⁴ The report was particularly critical of the uneven quality of analyses that were conducted, noting that HUD did not specify the content or scope of AIs. The GAO also questioned whether AIs had any effect, given that they did not need to be submitted to or reviewed by HUD, and that many AIs were not even signed by local elected officials.

The AFFH Rule’s Specifics. After nearly seven years of internal and public debate, HUD issued its final AFFH rule in 2015. The rule sought to operationalize the Administration’s new approach while addressing many flaws identified by the GAO¹⁵ and others. It delineated substantive objectives in a new way and articulated a new process that redefines the roles of the federal government and state and local actors. In doing so, it reworked how fair housing issues are to be incorporated into participants’ planning processes and into how HUD (and potentially other) resources would be allocated. Collectively, these represented a significant shift in approach, one that directly relates to mixed-income strategies.

The Final Rule’s Explanation of Core AFFH Objectives. To provide clarity of purpose, and for the first time, HUD’s rule defines the duty to affirmatively further fair housing.

¹³ For a description of the AI process, see U.S Department of Housing and Urban Development, *Fair Housing Planning Guide Vol. 1*, (Washington, DC: United States Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, 1996) <https://www.hud.gov/sites/documents/FHPG.PDF>.

¹⁴ After collecting and reviewing more than 400 AIs the GAO found that a large share of jurisdictions did not have AIs that were current, and the GAO questioned the usefulness of many of the AIs that did exist, concluding that “[a]bsent any changes in the AI process, they will likely continue to add limited value going forward in terms of eliminating potential impediments to fair housing that may exist across the country” Government Accountability Office, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans*, (Washington, DC: United States Government Accountability Office, 2010), <https://www.gao.gov/assets/320/311065.pdf>.

¹⁵ Government Accountability Office, “Housing and Community Grants”

Specifically, it explains that the AFFH mandate requires “meaningful” actions to:

*...overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.*¹⁶

The rule continues by articulating four objectives for the AFFH effort: (1) to address significant disparities in housing needs and in access to opportunity (emphasis added), (2) to replace segregated living patterns with truly integrated and balanced living patterns, (3) to transform racially or ethnically concentrated areas of poverty into areas of opportunity, and (4) to foster and maintain compliance with civil rights and fair housing laws.

By setting these four objectives, the rule makes clear that furthering fair housing can entail both place-based investments and steps to promote mobility, thus addressing perhaps the preeminent fair housing tension, and embracing investment strategies in either domain that are likely to promote income mixing. Further, it clarifies that non-housing disparities are relevant to AFFH objectives and must be addressed. This more holistic focus may also incentivize mixed-income strategies as one feasible means of lowering neighborhood disparities. Finally, by including the four objectives, the rule clarifies that the specific actions to be taken by state and local actors would be determined locally rather than being dictated by HUD.

The Updated AFFH Process. The rule seeks to clarify how participants should assess current conditions in their communities by replacing the much-criticized AI process and document with a standardized and very detailed Assessment of Fair Housing (AFH) tool that includes specific questions to be answered. The analysis seeks to push jurisdictions to go beyond describing patterns of segregation to assess racial and ethnic disparities in the quality of neighborhood-based services such as schools, employment, and transportation. Along a similar vein, the AFH contains a section focusing specifically on areas of racial or ethnic concentration of poverty. These analyses seek to help localities to assess residential segregation through a lens that focuses on the linkage between racial separateness and inequality of opportunity, and hence adopt strategies to increase equity and inclusion.

To facilitate that analysis, and consistent with a shift in HUD’s role in the process, HUD provides detailed data publicly on all jurisdictions and their surrounding regions, including data on segregation, location of subsidized housing, and disparities in measures of opportunity. In doing so, HUD seeks to provide direction and serve as a resource to state and local actors—especially helpful to entities without significant data capability—and to “democratize” the inputs

¹⁶ 24 C.F.R. § 5.152 (2000), <https://www.law.cornell.edu/cfr/text/24/5.152>. The rule explains that “meaningful actions” means “significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.”

relevant to the process by making those data publicly available to all stakeholders. The rule establishes a more inclusive process by requiring a robust community engagement process, specifying several steps designed to ensure community input is incorporated into the final assessment.¹⁷

Importantly, unlike AIs, AFHs must be submitted to HUD, and within 60 days HUD needs to determine if the AFH is accepted.¹⁸ Jurisdictions must reference their AFH priorities and goals in their next administrative plan required for HUD funding (e.g., consolidated plans),¹⁹ and need to have an AFH accepted by HUD prior to receiving that funding. In theory, there is a direct link here between strategies proposed in the AFH and the spending of resources, at least HUD resources, though the AFH may include goals for non-HUD resources as well. Subsequent AFFHs must assess the participants' progress on their previous AFFH goals in a continuous assessment and learning loop.

Finally, in recognition that fair housing issues cross jurisdictional and agency boundaries, the final rule notes that HUD not only permits but encourages collaboration through jointly submitted AFHs. Collaboration can occur among multiple jurisdictions, as well as between jurisdictions and public housing agencies (PHAs). PHAs were not required to conduct AIs previously, so are now conducting comprehensive fair housing assessments for the first time.²⁰

Integrating AFFH and Income-Mixing Strategies

While income-mixing strategies can be important to promote equity and inclusion, they often have negative racial impacts either through displacement of a predominantly minority population or through shifts in neighborhood services and organizations that feel alienating to long-standing residents. Such actual and cultural displacement mean these strategies can have an unequal distribution of benefits and costs.²¹ Income-mixing strategies adopted within AFFH may

¹⁷ Community input is required before the drafting of the AFH; the draft AFH must be made available for public comment; and akin to the federal rulemaking process, jurisdictions need to reference public comments in their AFH submission and explain the reasoning for not addressing specific comments in the content of the AFH.

¹⁸ Acceptance means the plan is complete and consistent with fair housing and civil rights laws. Acceptance does not deem a jurisdiction is necessarily meeting all its fair housing obligations.

¹⁹ Consolidated plans are the planning and reporting requirements for CDBG recipients. Since 1995, CDBG recipients have been required to conduct AIs as part of their Consolidated plans (though the AI itself was not included or referenced in those plans). See: Raphael Bostic and Arthur Acolin, "The Potential for HUD's Affirmatively Furthering Fair Housing Rule to Meaningfully Increase Inclusion" (Paper presentation, *A Shared Future: Fostering Communities of Inclusion in an Era of Inequality*, Cambridge, MA, April 2017), https://www.jchs.harvard.edu/sites/default/files/a_shared_future_potential_for_hud_affh_increase_inclusion.pdf.

²⁰ Prior to HUD's final rule, PHAs self-certified that they were meeting their AFFH obligations as part of their HUD planning process.

²¹ For example, on displacement in HUD's Hope VI program, see Susan J. Popkin, "A Glass Half Empty? New Evidence from The HOPE VI Panel Study," *Housing Policy Debate* 20, no. 1(2010): 45, <https://www.tandfonline.com/doi/pdf/10.1080/10511481003599852?needAccess=true>.

help ensure that the racial implications of these strategies are incorporated into program design up front and in subsequent assessments, in a way that is a helpful check on differential racial burdens and benefits. By way of example, one can envision how efforts to use Low-Income Housing Tax Credits (LIHTC) to redevelop a site for mixed-income housing as part of an AFH goal might need to assess and ameliorate racial impact if virtually all of the pre-existing tenants were people of color and/or with disabilities. Similarly, if the development was in an area of high opportunity that was largely white, it might require a robust approach and commitment of resources to tenant recruitment from minority communities, plus amenities designed to support them.²²

The AFFH data and engagement processes also are potentially positive additions to income-mixing strategies, because they provide low-income and minority communities with tools and a process through which to participate. That buy-in can—but will not always—shape eventual outcomes. Perhaps just as importantly, there is a hope that the data will reveal over time whether such strategies contributed to increased equality of opportunity and, if they did not or did so only partially, how they might be adjusted to be more effective and overcome any negative consequences.

Moreover, by focusing on racially concentrated areas of poverty and a broader way of thinking about opportunity, the AFFH rule places mixed-income strategies in a desired lens of opportunity, not just housing. The key outcomes are not just the tenant composition of a mixed-income complex but whether and how those communities are linked to high-quality jobs, public education, public safety, transit, etc. The AFFH rule charts a course that prioritizes this broad perspective, and thus helps put income-mixing strategies—at least those that share a similarly broad frame—squarely in the mix as a desirable component in a locality’s approach to AFFH.

Finally, there is also an explicit aspiration in AFFH for social inclusion— not just presence—of all members of a community. This potentially helps focus mixed-income development strategies on a noted challenge: that they do not accomplish true inclusion of lower-income households.²³

Initial Critiques During the Rule-Making Process

While many commentators respected the substantial shifts HUD made in its approach to the AFFH implementation process, public comments were extensive and often quite heated, reflecting widely differing perceptions about the purpose, value, and desired outcomes. While some people expressed hostility or indifference to the FHA’s mandate, stakeholders supportive

²² Editor’s note: All references in this essay to black/African-American, white, or Asian populations refer to non-Hispanic/Latinx individuals unless otherwise noted.

²³ Robert J. Chaskin and Mark L. Joseph, *Integrating the Inner City: The Promise and Perils of Mixed-Income Public Housing Transformation* (Chicago, IL: University of Chicago Press, 2015), 21.

of fair housing goals raised a range of concerns during the rule’s development and after its issuance.

The fair-housing advocacy community raised significant concerns about the lack of enforcement tools and processes in the new rule, questioning whether HUD had struck the appropriate balance between support to state and local actors and accountability for those who did not respond meaningfully to the new process.²⁴ They noted the long history of segregated housing patterns sometimes reinforced by existing municipal boundaries, and observed that even well-intentioned local jurisdictions frequently faced opposition if they sought to promote integration and otherwise address fair housing challenges. Thus, fair housing critics questioned whether the rule included sufficient monitoring tools and assessment mechanisms to determine when local actors appropriately used the discretion they had been granted. This concern was exacerbated by the rule’s “default approval” provision by which HUD would deem an AFH “accepted” if HUD did not disapprove or raise concerns about it within 60 days.²⁵ While the legal significance of this “acceptance” was uncertain, fair-housing advocates saw it as a step toward a safe harbor that might insulate entities from liability who failed to take meaningful actions.

In tension with this concern, many state and local governments and other actors responsible for complying with the new rule were skeptical that HUD would be able to embrace a more collaborative role and meet its obligation to support communities with data and technical assistance. For some HUD grantees responsible for undertaking the new process, HUD’s rhetoric outstripped the reality of the process that had been set up. For example, the rule strongly encouraged collaboration between different actors and joint submission but did not provide an assessment tool designed to be used for such collaborations, nor incentives (financial or otherwise) to do so. On the flip side of the concern raised by fair housing advocates, state and local actors wondered whether HUD would support their discretionary decision making.

Finally, there were questions about scale: whether the resources at issue were sufficient to meet the AFFH objectives through the process the rule set forth. In other words, some doubted that the rule could satisfy the AFFH mandate because it neither contributed significant new resources nor changed existing statutory or regulatory terms of HUD programs to expand options that state and local governments might choose. From a resource perspective, some noted that there was no new HUD funding available and other public resources—such as those involving transportation and education, which were larger and arguably more critical contributors to development patterns—were not subject to the rule. Others questioned whether HUD needed to

²⁴ For a good articulation see Michael Allen, “HUD’s New AFFH Rule: The Importance of the Ground Game”, *The Dream Revisited* (blog), *NYU Furman Center*, September 2015, <http://furmancenter.org/research/iri/essay/huds-new-affh-rule-the-importance-of-the-ground-game>.

²⁵ See final rule, in “Federal Housing Administration (FHA): Small Building Risk Sharing Initiative Final Notice” *Federal Register* 80, no. 136 (July 16, 2015): 42105, <https://www.govinfo.gov/content/pkg/FR-2015-07-16/pdf/FR-2015-07-16.pdf>.

provide greater flexibility in the way that HUD’s existing program funds, which are significant, could be used.

The conflicting concerns about enforcement versus useful planning mirror tensions HUD grappled with internally in building a useful planning tool that also had appropriate teeth when needed. In some sense, this middle ground gave all stakeholders something to dislike. Whether HUD would be able to implement the rule in a way that provided jurisdictions with the flexibility needed for a new planning process while also holding jurisdictions accountable was an aspiration that would require adaptation following on-the-ground experience. In this and myriad other situations, the AFFH rule reflected the complexity of equity planning in the balances it struck between competing priorities and its awareness of the multiple ways that goals might be achieved. As such, it anticipated, at least implicitly, how it might be refined and improved with increased funding, engagement of other departments, and sustained attention to learning.

Current Status: Early Lessons and Threats

HUD issued its final rule in July of 2015, which made the first AFHs due to HUD in 2016.²⁶ With no existing AFHs to serve as models, and an entirely new process unfolding, there was great uncertainty among grantees and HUD staff in this early stage. The rule happened to be passed when there was a particularly small group of grantees next up in the consolidated planning cycle, permitting HUD (and philanthropy) to focus attention and technical assistance on “first submitters.”²⁷

By January 2018, 49 AFHs had been submitted to HUD and had received an official notice of acceptance or non-acceptance. Eighteen of those submissions were accepted outright; 14 received initial feedback from HUD on needed improvements and were quickly resubmitted and accepted; and the remaining 17 were formally not accepted.²⁸ There were several potential surprises and insights from these early submissions. First, it was notable that HUD proactively provided feedback to submitters so their entries could be corrected for minor omissions and resubmitted, potentially in a learning loop for both grantee and HUD. While such a mechanism was intended by the rule, this required HUD staff to work much more in partnership with submitters toward a common goal (acceptance) than a traditional “compliance stance” would permit.

²⁶ The timing of a jurisdiction’s AFH depends on when their next consolidated plan is due, generally running on a five year cycle.

²⁷ The Ford Foundation and Open Society Foundations, in particular, provided funding for technical assistance on the ground in numerous jurisdictions.

²⁸ Justin Steil and Nicholas Kelly, “The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance”, *Housing Policy Debate* 29, no .1 (2019):85-105.

The second surprise was that HUD actually rejected a sizable number of AFHs. In the 50 years since passage of the FHA, HUD has withheld funding on an AFFH basis only a handful of times.²⁹ These 17 non-acceptances put more than 20 jurisdictions and public housing agencies at risk of not receiving HUD funding.³⁰ In their review of the 17 non-acceptances and the comments HUD provided those submitters, Steil and Kelly³¹ report that the most common weaknesses cited concerned setting realistic goals that would also meaningfully advance fair housing goals, as well as creating measurable metrics for assessing progress on those goals. Eight of the 17 non-accepted AFHs subsequently were revised, re-submitted, and accepted by HUD by the time the rule was suspension.

Analysis comparing the content of these first AFH submissions to earlier AIs of the same jurisdictions provides some early indication that local jurisdictions' responses were consistent with HUD's aspirations. Steil and Kelly found that AFHs for 28 of the first submitters included more concrete and quantifiable goals and more new actions to achieve those goals than did the preceding AIs.³² In terms of cross-silo or holistic aspirations, AFHs were more likely than AIs to contain goals related to transportation improvements; economic development, such as increased workforce training or job creation; and the environmental, such as improvements in air and water quality or parks. Strategies to achieve those types of goals may be most likely to increase income mixing as well, because improvements in the non-housing aspects of neighborhoods may attract residents across a broader range of incomes or might be explicitly connected to a mixed-income development strategy. The researchers also found that, on average, AFHs were more likely than AIs to contain goals for regional cooperation or coordination. Indeed, the majority of AFHs submitted to date are collaborative or joint in some fashion.

An analysis of the inclusiveness of the process, conducted on 19 of the first AFH submitters by Been and O'Regan, concluded that the public engagement processes used under the AFH requirement were much more robust, along five distinct dimensions.^{33,34} For example, jurisdictions used a much more extensive set of communication channels to solicit participation in their AFH process, provided many more opportunities for participation, and adopted more

²⁹ Alex Schwartz, *Housing Policy in the United States*. 3rd Ed. (New York: Routledge, 2014)

³⁰ Most AFH submissions were collaborations, either between a jurisdiction and its PHA, or/and multiple jurisdictions, itself a goal of the new AFFH rule. For access to early submitted AFFHs, see: Justin Steil, "Assessment of Fair Housing by City," Department of Urban Studies and Planning, Massachusetts Institute of Technology, accessed May 16, 2019, <https://steil.mit.edu/civil-rights-and-fair-housing-city>.

³¹ Justin Steil and Nicholas Kelly, "Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing", *Housing Policy Debate* (forthcoming).

Ibid.

³³ Vicki Been and Katherine O'Regan "The Potential Costs to Engagement of HUD's Assessment of Fair Housing Delay," *NYU Furman Center Blog*, (March 7, 2018), <http://furmancenter.org/research/publication/the-potential-costs-to-public-engagement-of-huds-assessment-of-fair-housing>.

³⁴ Specifically: the number of opportunities for public engagement; the inclusiveness of those opportunities; the provision of data for assessing public engagement; documentation and consideration of the public input; and existence of cross-jurisdictional or cross-sector engagement.

accommodating engagement strategies. This included bringing the AFH conversation to where people might already be, such as community meetings on non-AFFH (but related) topics in their own communities. There was, however, great variation in the engagement practices used by jurisdictions, and unlike other aspects of the AFFH rule, specifics of the engagement process are not prescribed within the rule (or assessment tool).

A third unexpected event occurred in January 2018 when HUD, in the context of a new Administration and under new leadership, took steps to halt the new process, leaving its future uncertain. At that time, HUD announced it was delaying implementation of the rule until October 31, 2020.³⁵ During the delay, jurisdictions that had not already had an AFH accepted were to return to the AI process. After fair housing advocates filed suit challenging the delay, HUD rescinded its delay of the rule but also removed the AFH assessment tool for local governments from formal use, essentially delaying implementation.³⁶ HUD has since announced its intent to develop a new regulation that would revise the AFFH process and AFH tool. In kicking off the process for what is known as Advanced Notice of Proposed Rulemaking, HUD cited the high non-acceptance of early submitters as part of its reasoning, as well as the burden on jurisdictions and HUD staff reviewing the new assessments. The notice requests comments on whether the AFH and its required engagement could effectively be folded into the existing consolidated planning process.³⁷

As the legal battle on removal of the tool unfolds, and HUD potentially undertakes a public rulemaking process, some jurisdictions are moving forward with assessments that more closely resemble AFHs than AIs, incorporating some or all of HUD's AFH assessment tool into their analysis and using robust public engagement processes to develop and revise their draft AIs. Those efforts, along with the early AFHs, are important examples of how well a process that incorporates new substantive and procedural steps dedicated to fair-housing issues and equitable opportunity might promote new approaches and improve older consolidated planning engagements.

Finally, numerous AFHs submitted before the rule's suspension either implicitly or explicitly contained mixed-income goals or strategies, affirming the potential of such a planning process to incentivize mixed-income strategies. For example, Nashville's AFH includes a mixed-

³⁵ HUD extended the AFH deadline for jurisdictions that had not had an AFH accepted and whose AFH deadline fell before October 31st, 2020. For those with deadlines between January, 2018 and October, 2020, this provides nearly a five year delay. See "Affirmatively Furthering Fair Housing: Withdrawal of Notice Extending the Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants," *Federal Register* 83, no. 100 (May 23, 2018): 23928, <https://www.govinfo.gov/content/pkg/FR-2018-05-23/pdf/2018-11143.pdf>.

³⁶ On August 17, 2018, the U.S. District Court of the District of Columbia found in favor of HUD on whether the delay violated the APA, and an appeal is pending. See "National Fair Housing Alliance et al versus Carson (2018)," Poverty & Race Research Action Council, accessed May 16, 2019, <https://prrac.org/national-fair-housing-alliance-et-al-v-carson-2018/>.

³⁷ For details see "Affirmatively Furthering Fair Housing: Streamlining and Enhancements," (August 2018), <https://www.hud.gov/sites/dfiles/FHEO/documents/AFFH-ANPR.pdf>.

income redevelopment strategy for its public housing stock, using HUD's [rental assistance demonstration](#) (RAD) program to invest in the public housing stock and to add workforce and market-rate housing.³⁸ Philadelphia's plan includes two mixed-income goals, one aimed at its use in areas of concentrated poverty as part of redevelopment and the second reviewing the zoning code to further incentivize mixed-income development more broadly. The plan submitted by five cities in the Kansas City metropolitan area provided some of the more concrete or explicit mixed-income strategies. This plan called for increased use of federal financing tools (including LIHTC) and leveraged financing to support mixed-income housing, and also noted the need for specific expensive jurisdictions in the region to provide formal incentives for mixed-income housing.

Implications for Action

At a time when there is growing understanding that opportunities stemming from where one lives have life-long consequences,³⁹ the effort to operationalize the AFFH mandate is notable. As an innovation in equity planning and how it informs the use of federal housing and community development resources to further fair housing, the AFFH rule marks a significant departure from HUD's prior approach and may also herald the potential for equitable planning in other realms.⁴⁰ And, as a fair-housing framework that recognizes the centrality of access to opportunity and that housing must be viewed in concert with education, transit, and other critical aspects of neighborhood vitality, it opens the door for income-mixing strategies to become more central to and integrated within approaches developed to further the AFFH mandate. In significant measure, the rule is a potentially innovative mechanism that could herald experimentation and new approaches to realize equity goals broadly.

As we assess the current state of play and look forward, we see four major areas for sustained attention and action for AFFH, particularly as it relates to mixed-income strategies.

³⁸ See Justin Steil's Fair Housing website for access to AFHs submitted to HUD before the suspension of the rule, at: "Assessment of Fair Housing by City," <https://steil.mit.edu/civil-rights-and-fair-housing-city>.

³⁹ See, for example, Raj Chetty, Nathaniel Hendren, and Lawrence F. Katz, "The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment," *American Economic Review* 106, no. 4 (2016): 856, https://scholar.harvard.edu/files/lkatz/files/chk_aer_mto_0416.pdf; Ralph Richard Banks, "An End to the Class versus Race Debate," *New York Times*, March 21, 2018, <https://www.nytimes.com/2018/03/21/opinion/class-race-social-mobility.html>.

⁴⁰ There is a growing body of experience and literature about efforts to incorporate equity planning in public programs (at all levels of government) that suggests potential value in broader investigation into common challenges and successes. See, for example, Federal Highway Administration, *Travel Behavior: Shared Mobility and Transportation Equity* (Washington, DC: US Department of Transportation, 2017), https://www.fhwa.dot.gov/policy/otps/shared_use_mobility_equity_final.pdf; Oregon Education Investment Board, *Equity Lens*, (2018); Jason Corburn, et al., "Making Health Equity Planning Work: A Relational Approach in Richmond, California," *Journal of Planning Education and Research* 35, no. 3 (2015): 268, <https://journals.sagepub.com/doi/pdf/10.1177/0739456X15580023>.

Implications for Policy.

- *Articulate more explicit policy aims and strategies that integrate economic and racial objectives.* Mixed-income goals are not explicitly incorporated into the AFFH rule, yet the broad focus on opportunity creates a space within AFFH for such strategies. Especially given the rule's emphasis that housing must be seen within a broader array of components in order to create "truly integrated living patterns" and "areas of opportunity," AFFH suggests that mixed-income strategies might be refined to more explicitly adopt such goals. With growing attention to the implications of both racial and economic integration, it is incumbent on advocates, policymakers, and researchers to push further to assess and develop when and how policies that advance these goals complement each other and discern ways to address circumstances when they are in conflict.
- *The federal government and its partners should continue to refine the rule and process.* Much like the continuous "learning loop" built into the rule for communities, HUD should continue to refine the rule and the process it delineates. Before the AFFH tool was suspended, more than 40 communities had their assessments approved by HUD, and those communities are still bound by the AFFH rule; another set of communities are undertaking assessments that essentially mimic the full AFFH process. Much can be learned from each of these groups about what works best in the process and what is less useful. Notably, for policymakers who focus on mixed-income strategies, this is an invaluable opportunity to examine how to develop processes that, from the outset, anticipate the interplay between income and race—including by paying more attention to applicable data sources and community outreach strategies.
- *Further develop standards that provide the appropriate balance of discretion and accountability in the oversight of local agencies.* Especially when assessing the interplay between mixed-income and racial-equity strategies, HUD should develop performance standards that allow income-mixing strategies to be assessed within a racial equity (AFFH) lens. This may be especially important for situations in which some aspect of the mixed-income strategy has a negative racial impact and thus requires amelioration.
- *Protect the rule from being dismantled.* Whatever the short-term successes or limitations of the rule, it unquestionably provides infrastructure on which to build. HUD's proposed rulemaking process could be used to radically revise the rule and assessment tool in a way that would undermine, not advance, the purposes of the rule

and strategies for creating more equitable and inclusive communities. At particular risk are the rule's broader focus on opportunity (critical for increasing equity and the primary link to mixed-income strategies) and the robust community engagement process (central to greater inclusion).⁴¹

Implications for Research and Evaluation.

- *Document and learn from the discussion and adoption of mixed-income strategies contained in submitted AFFHs.* Those communities that included (explicit or implicit) mixed-income development strategies in their prioritized AFFH goals could provide valuable lessons for other communities, particularly in how they articulated the connections and any tensions that arose in those discussions. Those lessons may be applicable beyond AFFH, and even beyond broader equity planning efforts.
- *Evaluate the efficacy of mixed-income strategies to reduce segregation and disparities in access to opportunity.* The experimentation occurring in AFFH and AFFH-like communities around the interplay between AFFH and mixed-income strategies could serve as an invaluable laboratory to determine how and when mixed-income strategies help to overcome patterns of segregation and reduce disparities in access to opportunity. This should include assessing whether there are tradeoffs between income and racial integration strategies, under what circumstances these occur, and what steps might be taken to align them.
- *Evaluating the efficacy of mixed-income strategies in addressing concentrated poverty.* Especially in places that are attempting to transform racially and ethnically concentrated areas of poverty, the AFFH rule and process could promote a more full-fledged incorporation of mixed-income strategies into the effort to overcome a challenge closely tied to the racialized history of housing and development policy. Here, too, the research agenda should include examining how and in what ways economic integration advances the goal of transforming these areas into places of opportunity, and what (if any) constraints would be appropriate in such endeavors.

Implications for Development and Investment.

- *Develop data-driven approaches for incorporating racial-equity ambitions into mixed-income strategies.* A challenge for mixed-income development and investment programs in the context of AFFH is their singular focus on income, while the AFFH

⁴¹ HUD's Advanced Notice of Proposed Rulemaking questioned the importance of neighborhood attributes for people older than thirteen years old and specifically asked for comments on whether the AFFH engagement process could be rolled into engagement for other planning purposes. See "Affirmatively Furthering Fair Housing" *Office of Federal Register*.40713

mandate (like other governmental civil-rights obligations) seeks to overcome racial disparities. An opportunity exists to deepen the ways in which mixed-income development programs and investments can use data about the racial differences of target communities or goal-setting that incorporates racial-equity ambitions. Similarly, it is valuable to deepen the data base that incorporates both income and racial measures to facilitate an analysis of progress on both economic and racial integration and associated well-being outcomes in terms of both race and class.

- *Broaden mixed-income strategies beyond reinvestment in lower-income communities.* The AFFH rule recognizes that the creation of more equitable and inclusive communities requires both place-based and mobility strategies. In this regard, it offers an opportunity to consider how mixed-income strategies (which typically have been place-based and targeted in lower-income communities) might be applied to efforts that give low-income families access to existing high-opportunity places. This might be done by pairing income-mixing place-based efforts with mobility strategies and/or targeting efforts to make existing areas of opportunity truly inclusive, in terms of composition and lived experience. Certainly, the evolution and refinement of inclusionary zoning strategies at the state (New Jersey), regional (Twin Cities), and local (New York City) levels, including their attention to the appropriate beneficiaries, suggests approaches that such efforts should include.

Implications for Residents and Communities.

- *Cull lessons on how best to develop meaningful community participation, especially in low-income and communities of color.* The AFFH rule, and the process it calls for, signal a meaningful commitment to substantive community participation—a critical aspect of inclusion—by linking community engagement more specifically to public-sector allocation decisions. In doing so, the rule recognizes the imbalance in power and technical knowledge between community residents and other stakeholders in the process, and seeks to address it by providing data to the public and ensuring that community comments are taken into account. Foundations and other entities have expanded these starting points by supporting community groups that seek to become involved,⁴² and holding intermediaries accountable for supporting high-quality

⁴² Note that there is significant public funding for local fair housing groups through the Fair Housing Initiatives Program (FHIP) and Fair Housing Assistance Program (FHAP) which in 2018 resulted in \$39.6 million and \$23.9 million, respectively going to non-profit and local government groups (See Libby Perl, *The Fair Housing Act: HUD Oversight, Programs, and Activities* (Washington, DC: Congressional Research Service, June 2018), <https://fas.org/sgp/crs/misc/R44557.pdf>.) This provides at least nascent infrastructure for fair housing community engagement support.

community engagement. The promise, but also pitfall, of such participation should be carefully examined by local leaders to see whether and how it advances resident and community interest and to develop local capacity on a jurisdiction-by-jurisdiction basis and national entities or intermediaries that can help support.⁴³ One specific issue relevant to mixed-income strategies involves understanding when and how these efforts do and do not “make the case” for communities of color.

- With adequate support, leaders of mixed-income efforts should ensure that residents and community members fully participate in project development and management. For residents and community members, the AFFH mandate offers the opportunity to engage and seek—even demand—access to the planning processes that control very large sums of money flowing from the federal government into their communities. Under the rules, residents and community members have the right to expect that these processes are responsive to their questions and concerns, and that the data are provided by local initiative leaders and used in ways that allow them to deepen their ability to participate.
- *Leverage the AFFH data and AFHs for best examples of data use for effective community engagement.* The AFFH tool provides maps and data meant to level the playing field, and add capacity to advocates and community members, but it is quite a bit of data. Residents and community representatives that are beginning their assessment processes should be provided with information by HUD and local partners that enables them to draw upon the experiences of those who conducted the first AFHs, including noting what appears to have worked—or not worked. In addition, residents might glean relevant lessons from other efforts where data was made available to enhance community participation, such as the experience of the [Home Mortgage Disclosure Act](#). Residents may find that the extensive public data in the AFFH tool will be useful in an array of processes designed to enhance community voice and interests beyond the AFFH planning process.

We conclude both on an optimistic note and by observing the challenge for future mixed-income strategies. Optimistically, while the long-run impact of the AFFH rule cannot be assessed yet, early lessons suggest there is ample reason for optimism that the rule embodies an important new approach that can and should be refined over time. We firmly believe it is possible to build on the rule and develop an approach to equitable planning inclusive of mixed-income strategies

⁴³ In an ideal world, one would plan over a multi-year period for what local and national capacities should be created. It’s noteworthy, for example, that the manner in which community groups used and applied HMDA data evolved over time.

that is consistent with the understanding Congress set forth when it enacted the FHA and included the AFFH mandate as one of its two statutory goals.

The challenge is that the issues of racial equity that were central to this nation when the Fair Housing Act was enacted 50 years remain no less significant today as the nation strives to live up to its aspirations. The AFFH rule provides an opportunity for appropriate mixed-income strategies to become fully incorporated into the ongoing efforts to meet this challenge. Both the AFFH rule and this challenge are well worth pursuing.

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